STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY HAMMOND,

Defendant-Appellant.

UNPUBLISHED
September 18, 2003

No. 231540
Macomb Circuit Court
LC No. 99-002657-FH

Before: O'Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to 50 to 240 months' imprisonment. We affirm defendant's conviction and sentence, but remand to the trial court for correction of the presentence investigation report (PSIR).

I. Trial Court Improperly Admitted Two Unedited Mugshots

Defendant argues that the admission of unedited photographs from his arrest for assault impermissibly placed his prior conviction before the jury. Generally, to preserve an evidentiary issue for review, a defendant opposing the admission of evidence must object at trial and specify the same ground for objection that defendant asserts on appeal. MRE 103; *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Here, defendant objected to the admission of the first photograph, which is the individual photograph used in the second and third photo lineups. Thus, defendant preserved the issue with regard to the first photograph. But defendant did not object the admission of the second photograph, which was the individual photograph used in his first photo lineup. Ordinarily, we would agree with defendant's assertion that this Court should consider this issue as preserved because a second objection may have been cumulative or fruitless after the trial court overruled defendant's first objection. See, e.g., *People v Shirk*, 383 Mich 180, 187-195; 174 NW2d 772 (1970) (if the substantive issue was raised before the trial court, a second patently futile objection was not necessary to preserve issue for appellate review). However, the record does not support defendant's assertion, with regard to the admission of the second photograph, because defense counsel affirmatively stated on the record, "No objection, Judge." Because defense counsel affirmatively expressed his lack of objection on the record defendant has waived appellate review of this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d

144 (2000).[1] Consequently, we will analyze the admission of the first photograph as preserved and need not review the admission of the second photograph as this issue has been waived.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when the lower court's decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *People v Yost*, 468 Mich 122, 127; 659 NW2d 604 (2003).

"Where a defendant has not taken the stand, an unedited mug shot would impermissibly place the defendant's prior conviction, if any, before the trier of fact and result in reversible prejudice." *People v Heller*, 47 Mich App 408, 411; 209 NW2d 439 (1973). Here, unlike in *Heller, supra*, the lower court record does not indicate that the individual photographs were edited before they were admitted into evidence. As such, defendant's prior conviction as a result of his arrest for assault and battery was placed before the jury because the photographs included defendant's police number and date of his arrest. However, the first photograph was admitted to demonstrate defendant's change in appearance from the time of the instant offense compared to his appearance at trial because defendant cut his shoulder length hair. Consequently, although defendant objected with regard to the admission of the first photograph, the trial court did not abuse its discretion in admitting the first photograph despite the failure of the prosecution to edit the photograph because (1) defendant raised an alibi defense and he questioned the victim's ability to recognize defendant from the picture, (2) the photograph corroborated the victim's identification testimony, and (3) Jeff Hammond, defendant's alibi witness, gave more damaging testimony which indicated that defendant had been involved in an assault. See *Heller, supra* at 411.

II. Ineffective Assistance of Counsel

Defendant raises several claims of ineffective assistance of counsel. We initially conclude that defendant has failed to rebut the presumption that he received effective assistance of counsel.

A. Failure to Suppress Photo Lineup Identifications

Defendant argues that defense counsel was ineffective because he failed to file a pretrial motion to suppress the victim's three photo lineup identifications of defendant. To preserve the

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[1] We note that, even under a plain error standard of review, reversal is not warranted with regard to the second photograph because defendant failed to establish that he was actually prejudiced by the admission of the second photograph particularly where (1) unlike the first photograph, the second photograph was not published to the jury during trial, (2) the victim testified that she had been shown a photograph of defendant where he appeared beaten up, and (3) Jeff Hammond testified that he and defendant had been involved in an assault. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Consequently, defendant was not prejudiced by the admission of the second photograph. *Id.*; *People v Heller*, 47 Mich App 408, 411; 209 NW2d 439 (1973).

issue of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing before the trial court. *People v Hoag*, 469 Mich 1, 6; 594 NW2d 57 (1999). Generally, failure to move for a new trial or *Ginther*[2] hearing forecloses appellate review. In the absence of an evidentiary hearing our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The deficiency must be prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). This Court will not second guess counsel's trial tactics. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Defendant first argues that there was an inference that he was in custody when the third photo lineup occurred, and, thus, his right to counsel was violated. Defendant correctly asserts that in "the case of photographic identifications, the right of counsel attaches with custody." *People v Kurylczyk*, 443 Mich 289, 301-302; 505 NW2d 528 (1993). However, as stated in defendant's brief on appeal, the record does not support this argument. The photograph with defendant holding the card, with the date of his arrest, was not referenced or admitted into evidence at trial, and is not part of the original record. Generally, this Court's review is limited to the record of the trial court or administrative tribunal, and it will allow no enlargement of the record on appeal. The original record consists of papers filed in the lower court, the transcript of any proceeding, and exhibits introduced. MCR 7.210 *et seq*.; see also *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), affirmed in part, reversed in part on other grounds 462 Mich 415 (2000).

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Further, in our review of the record, defendant has failed to establish an inference that he was in custody on the basis of the victim's preliminary examination testimony that she was shown the third photo lineup at 2:30 p.m. and defendant was given his constitutional rights at 3:30 p.m. The arresting police officer testified at trial that he arrived at defendant's home immediately after the victim identified defendant in the third photo lineup. Assuming that the police report accurately reflects that defendant was given his constitutional rights at 3:30 p.m., defendant has not established a reasonable inference that he was in custody at the time of the third photo lineup. As such, defendant's right to counsel was not violated because the photo lineups were precustodial. *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001) (counsel not required at precustodial, investigatory photographic lineups). Trial counsel was not required to advocate a meritless position. *Snider, supra* at 425. Consequently, defendant has not established an error apparent on the record. *Id.* at 423.

Defendant also argues that his right to counsel was violated because the photo lineups were conducted under "unusual circumstances." Generally, the right to counsel does not attach to precustodial photographic identifications. See *McCray, supra* at 639. A defendant is, however, entitled to counsel at a precustodial photographic lineup when the circumstances underlying the investigation are "unusual." *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000). Unusual circumstances exist where a "witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant." *Id*., quoting *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). We note that defendant disregards (1) the investigating police officer's testimony indicating that the "purpose of a photo lineup was to establish and eliminate suspects," (2) the police had another possible suspect, who had a history of home invasions and had features similar to defendant, and (3) the police conducted another lineup because another suspect had been seen lurking around the victim's apartment complex. Because the police had a viable suspect, other than defendant, we conclude that multiple photo lineups were not conducted under unusual circumstances that are apparent on the record. *Snider*, *supra* at 423.

Next, defendant argues that the photo lineup was suggestive because (1) his photograph was repeatedly placed in the same position in each of the three photo lineups, and (2) the victim's description of defendant's height and eye color differed from defendant's physical characteristics. "In order to sustain a due process challenge [based on a pretrial identification procedure], a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk, supra* at 300-301. When a previous identification procedure is so impermissibly suggestive that it created a substantial likelihood of misidentification, the testimony regarding the previous identification must be excluded, but the witness' in-court identification can still be admissible if an independent basis for the in-court identification is established. *McCray, supra* at 638, citing *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

"Generally, the photo spread is not suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features and thus, are sufficient to reasonably test the identification." *Kurylczyk*, *supra* at 304. There is no authority requiring the police to make endless efforts to attempt to arrange a line-up. *People v Benson*, 180 Mich App 433, 438; 447 NW2d 755 (1989), reversed in part on other grounds 434 Mich 903 (1990). A

defendant must first establish that there was a high likelihood of misidentification under the factors outlined by our Supreme Court:

> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. [*Kurylczyk, supra* at 306.]

Here, a review of the totality of the circumstances does not suggest that defendant's photo line-up was impermissively suggestive. First, the victim never hesitated when she identified defendant and testified at trial that she was certain that defendant was the person in her apartment. Second, the victim's description regarding defendant's hair color and texture, and his mustache matched defendant's physical characteristics. Third, the victim's description of the color of his pullover that he was wearing matched the color and style of a pullover that the arresting officer retrieved from defendant's home on the day of his arrest. Fourth, the victim had a strong emotional reaction to defendant's picture. At the time of the instant offense, the victim exhibited no signs of psychological debilitation, rather, the victim testified that she cursed at defendant to leave. Fifth, the three photo lineups were conducted within two days of the home invasion. Sixth, defendant's repeated placement in the same position was not unduly suggestive because the victim was able to discern the difference between the second and third photo-lineups which suggested that she was acutely aware of the differences in the photographs that were presented to her, and she was not just automatically identifying defendant on the basis of her previous identifications. Lastly, although the investigating police officer used a picture of defendant, where he had cuts and bruises in the first photo lineup, this did not make the photo lineup impermissibly suggestive. Although the victim testified that she remembered seeing a picture of defendant where he was "beat up," the victim indicated that this photograph was in the last photo lineup that she was presented, which suggests that this was not the first photographic image of defendant that she recalled, and that defendant's scars and bruises were not the basis for her identification of defendant. "A suggestive lineup is not necessarily a constitutionally defective line-up." *Kurylczyk, supra,* 443 Mich 305-306.

We are cognizant that there were factors that tended to undermine the reliability of the line-up identification: (1) according to the victim, defendant was in the apartment for one minute or less, and (2) the disparity between the victim's description of defendant's eye color and height, and the actual physical characteristics of defendant. However, in light of the other factors previously mentioned, these factors do not render the victim's' identification inadmissible. We note that defendant emphasizes the disparity in height. But in the victim's initial statement to the police she indicated that defendant was her height or *taller.* We, therefore, conclude for all the reasons previously stated, defendant has failed to establish any errors apparent on the record to warrant a conclusion that he was denied the effective assistance of counsel for failing to suppress the victim's identification of defendant. *Snider*, *supra* at 423.

B. Failure to Suppress Post Custodial Statements

Defendant argues that defense counsel should have moved to suppress his post custodial statements because he was arrested in his garage without a warrant, which was an extension of his home, and thus, his arrest was illegal. Generally, a warrant is not required to accomplish a

felony arrest in and of itself. *People v Johnson*, 431 Mich 683, 691; 431 NW2d 825 (1988). "Indeed, pursuant to MCL 764.15, an arrest warrant is not required so long as there is probable cause to believe that defendant committed a felony." *Id*. "However, when an arrest occurs in the defendant's residence, the federal and state constitutions require that special protections be afforded." *Id.*, citing *Payton v New York*, 445 US 573, 589; 100 S Ct 1371; 63 L Ed 2d 639 (1980); *People v Oliver*, 417 Mich 366, 378-379; 338 NW2d 167 (1983). "Entry into a private home without a warrant to effect the arrest of a defendant is justified either by consent or exigent circumstances." *People v Allen*, 429 Mich 558, 654 n 23; 420 NW2d 4999 (1988).

This Court has previously rejected an argument similar to defendant's, where a defendant was arrested without an arrest warrant, and the defendant argued that the initial entry into his home was unconstitutional, and thus, his post custodial statement should be suppressed. *People v Dowdy*, 211 Mich App 562, 568; 536 NW2d 794 (1995). This Court disagreed and adopted the reasoning in *New York v Harris*, 495 US 14; 110 S Ct 1640; 109 L Ed 2d (1990):

> We adopt the *Harris* rationale that the exclusionary rule was not intended to grant criminal suspects protection for statements made outside their premises where the police have probable cause to arrest the suspects for committing a crime. [*Dowdy*, *supra* at 570.]

"In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair minded person of average intelligence in believing that the suspected individual had committed the felony." MCL 764.15(c); *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 48 (1998). Here, the record established that the police had probable cause to arrest defendant, and a fair minded person of average intelligence would believe that defendant committed the home invasion on the basis of (1) the victim's three identifications of defendant, (2) the victim's description of defendant's facial features (mustache and teeth) and hair matched his physical characteristics, and (3) defendant's home was in close proximity to the victim's apartment.

Defendant was not arrested solely for the purpose of questioning and the police did not use his arrest as a tool to obtain his custodial statements. In sum, defendant has failed to establish errors apparent on the record, and thus, defendant has failed to rebut the presumption that he was denied the effective assistance of counsel. *Carbin*, *supra* at 599-600.

C. Failure to Object to Opinion Testimony

Defendant argues that defense counsel was ineffective for failing to object to the investigating police officer's opinion testimony regarding defendant's post arrest statements. Defendant asserts that the investigating police officer gave improper opinion testimony because his testimony essentially told the jury he believed that defendant was guilty. We disagree and conclude that (1) defendant's argument is not supported by the record, and (2) the investigating officer's testimony was relevant and properly admitted.

Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). A general denial of guilt puts at issue all elements of a charged offense, regardless whether any of them are

specifically disputed or are stipulated. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888, on second remand 242 Mich App 656; 620 NW2d 19 (2000). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Sabin*, *supra* at 58.

Here, the testimony was relevant because defendant raised a defense of mistaken identity. Defendant's statements were probative of his involvement and his alibi defense. At trial, defendant's defense was premised on establishing that he was not inside the victim's apartment. Yet, defendant, in his interview with the police, gave noncommittal or evasive answers to questions regarding his whereabouts on the night of the offense. As such, the testimony was properly admitted pursuant to MRE 701, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Additionally, "[i]n general, police officers may provide lay opinions about matters that are not overly dependent on scientific, technical, or specialized knowledge." *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989). Lastly, the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice pursuant to MRE 403. While the testimony was adverse to defendant's position, it was not inequitable to use defendant's prior statements, nor was the testimony given undue or preemptive weight by the jury in light of the more damaging evidence presented against defendant which included: (1) the victim's identifications of defendant, and (2) Hammond's inconsistent testimony on the stand regarding the time he saw defendant. As defendant's alibi witness, and the only person who could affirmatively establish that defendant was home at the time the instant offense was committed Hammond gave inconsistent testimony regarding the time that he saw defendant. Consequently, defendant has not established an error apparent on the record regarding the investigating officer's testimony to warrant a conclusion that he was denied the effective assistance of counsel. *Snider*, *supra* at 423.

D. Failure to Object to Jury Instruction

Next, defendant argues that when the trial court gave the following curative instruction, where defendant did not testify, the trial court improperly led the jury to believe that defendant had a criminal conviction. The trial court instructed the jury as follows:

> There is evidence that the defendant had been convicted of a crime in the past. You may consider the evidence only in deciding whether you believe the defendant is a truthful witness. You may not use it for any other purpose. A past conviction is not evidence that the defendant committed the alleged crime in this case.

Here, we conclude that the trial court's sua sponte jury instruction was appropriate because Hammond informed the jury that defendant had assaulted him. Although the trial court misrepresented to the jury that defendant had testified, we are satisfied that the harm that the jury

was advised to disregard, consideration of defendant's assault conviction, outweighed the reference to defendant's testifying, particularly where it was evident that defendant did not testify. Further, the trial court gave an instruction that a defendant has the right to not testify, and the trial court stated, "You must not consider the fact that [defendant] did not testify. It must not affect your verdict in any way." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998). Although defendant argues that the impeachment instruction confused the jury, defense counsel argued defendant's theory of the case during closing argument, and thus, the jury was informed of the issues presented. Consequently, we conclude that the jury was fully and fairly presented with the issues in the case because the trial court's impeachment instruction "did not remove a not guilty verdict from the jury's consideration, did not rule as a matter of law on any element of the offense, . . . did not misdefine any defense, and did not omit a basic and controlling issue in the case." *Lee, supra* at 183.

E. Failure to Secure Alibi Witness

Defendant also argues that defense counsel was ineffective because he failed to secure the testimony of Michael Harless, a potential alibi witness, who was included in defendant's notice of alibi. Generally, decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Daniel, supra* at 58. A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*

Here, we note that defense counsel gave late notice to the trial court and failed to serve a subpoena. However, defense counsel may have arguably made an earlier tactical decision to not pursue Harless' presence in court in light of Harless' unwillingness to assist in defendant's defense, and because Harless' testimony would not have established that defendant was inside his home. Defendant is not able to allege that he was deprived of a substantial defense because defendant never made an offer of proof regarding the nature of Harless' proposed testimony, and thus, it is uncertain if Harless' testimony would have impacted defendant's case in a substantial manner. Defendant was not denied the opportunity to present a substantial defense because he still had the opportunity to present his alibi defense with the testimony of his mother and Hammond as alibi witnesses. Arguably, defense counsel's trial strategy may have been to discredit the victim and the police investigation, and this Court will not second guess counsel's trial tactics. *Williams, supra* at 332.

F. Failure to Object to Improper Scoring of SIR at Sentencing

Defendant argues that he is entitled to resentencing because he was sentenced on the basis of the improper scoring of PRV 5. Defendant argues that PRV 5 was scored improperly and he should have only received five points instead of ten points. As a consequence, defendant argues that he is entitled to resentencing because he would have received a lower minimum guidelines range of fifteen to twenty-five months.

In scoring PRV 5, MCL 777.55(1)(c) requires an assessment of ten points if "[t]he offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications."

Five points are assessed if "[t]he offender has 2 prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1)(d). "Prior misdemeanor conviction" is defined as "a conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed." MCL 777.55(3)(a).

Defendant argues that a 1999 assault and battery conviction should not have been scored as a prior misdemeanor conviction because defendant entered a plea of guilty on September 1, 2000, and the instant offense was committed on September 20, 1999. In our review of the judgment of sentence for the assault and battery conviction, the assault and battery conviction could not be considered as a prior misdemeanor conviction because the instant offense occurred on September 20, 1999. But defendant had four remaining previous misdemeanor convictions, and if the assault and battery conviction was considered in scoring PRV 5, it was not prejudicial because defendant had four previous misdemeanor convictions that supported the assessment of ten points in scoring PRV 5. Consequently, defendant has not established that the possible misscoring of PRV 5 was prejudicial to defendant to the extent that, but for counsel's error, the result of the proceedings would have been different. *Carbin*, *supra* at 599-600. We have reviewed defendant's additional claims of ineffective of counsel in his supplemental brief and we similarly conclude that defendant has not rebutted the presumption that he received the effective assistance of counsel and there is no showing on the record that but for an error of counsel the result would have been different. *Id.*

There is no showing on the record that but for an error of counsel the result would have been different. Moreover, defendant has failed to overcome the presumption that he received the effective assistance of counsel. Based on the record, upon a de novo review of these constitutional issues, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. *LeBlanc, supra* at 579.

III. Prosecutorial Misconduct

Defendant raises several claims of prosecutorial misconduct on the grounds of improperly admitted evidence and improper comments during opening statement and closing argument. We initially conclude that defendant has failed to establish a claim of error.

A. Testimony Regarding Defendant's Employment Status

Defendant first argues that the prosecution, without the required advanced notice, improperly introduced testimony as character evidence that defendant was not working and had been unemployed for a year. Whether evidence may be properly admitted under a specific rule of evidence is a question of law reviewed de novo. *People v Small*, 467 Mich 259, 262; 650 NW2d 328 (2002). The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Snider*, *supra* at 419.

This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.

People v Bahoda, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Generally, the introduction of a defendant's other acts cannot be admitted as evidence if they are offered to prove the defendant's character or propensity to commit the offense. *People v Rice*, 235 Mich App 429, 440; 597 NW2d 843 (1999). MRE 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

First, we conclude that evidence of unemployment does not constitute a "bad act" for purposes of MRE 404(b) notice, because being unemployed may be attributed to conditions beyond a defendant's control. See, e.g., *People v Jones*, 73 Mich App 107, 109-110; 251 NW2d 264 (1976) (automatic reversal not required where prosecution asked about the defendant's unemployment status). Defendant's employment status was relevant because defendant informed the police that once he arrived home after going to the store and driving his mother to work, he remained at home until he had to go to work the next day. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(b); *People v Ross*, 145 Mich App 483, 489; 378 NW2d 517 (1985). The trial court could properly allowed the prosecution to elicit testimony regarding Mary Marth's financial relationship with defendant to attempt to establish whether Marth received any financial benefit by having defendant reside with her and if she would receive a benefit if defendant was acquitted. "Evidence of a witness' bias or interest in a case is highly relevant to credibility." *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995).

B. Prosecution Introduced Evidence that Defendant had a Previous Conviction.

Next, defendant argues that the prosecution asked Hammond if he had obtained a personal protection order ("PPO") against defendant, and thus, Hammond stated that he and defendant went to court for assault and battery. Here, the record established that Hammond's reference to defendant's assault was unresponsive to the prosecution's question. Indeed, the last question presented to Hammond was "Do you remember getting a PPO?" The prosecution did not ask about the underlying circumstances, and thus, Hammond volunteered the information that defendant was involved with an assault. "Generally, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Accordingly, defendant has not established, plain error that affected defendant's substantial rights and he cannot avoid forfeiture of this issue. *Carines*, *supra* at 763.

C. Prosecution Allowed False Testimony to Be Admitted into Evidence

Lastly, defendant argues that the investigating police officer falsely testified when he indicated that the police officer actually was unable to contact two of defendant's alibi witnesses when defendant asserts that he had contact with all defendant's alibi witnesses. Under the Due

Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Prosecutors, therefore, have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. *Id.* Michigan courts have also recognized that the prosecutor may not knowingly use false testimony to obtain a conviction. *Id.* A prosecutor's failure to correct false testimony does not automatically require reversal. *Id*., 280. A new trial is required only if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *Id*.

Here, we conclude that the record does not support defendant's argument. The investigating officer testified that after the prosecution requested that he speak with defendant's proposed alibi witnesses, he never spoke to Marth and Hammond as alibi witnesses. According to the investigating officer's testimony, he spoke with Marth at the time of defendant's arrest and the supplemental report indicates that he spoke to Hammond on the night of defendant's arrest. The investigating police officer further testified that in February 2000, he left a telephone message for defendant's mother and Hammond to contact him as potential alibi witnesses and yet, they never returned his phone call or presented themselves as alibi witnesses. Defendant has failed to establish plain error. *Carines, supra* at 762-763.

We have reviewed defendant's additional unpreserved claims in his supplemental brief and we similarly conclude that defendant has not established that he was denied a fair trial or that any alleged error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. See *Id.; People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant's conviction and sentence is affirmed, but we remand to the trial court for correction of the PSIR to accurately reflect defendant's conviction date for the assault and battery conviction.[3]

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

[3] As previously noted, the PSIR indicated that defendant was convicted of assault and battery on September 1, 1999, defendant actually entered his guilty plea on September 1, 2000. "If the trial court finds that challenged information in the PSIR is inaccurate or irrelevant, that finding must be made part of the record and the information must be corrected or stricken from the report." MCL 771.14(6); MCR 6.425(D)(3)(a); *People v Hoyt*, 185 Mich App 531, 534; 462 NW2d 793 (1990).